Filed 12/29/09 Richmond Residents for Responsible Antenna Placement v. City of Richmond CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

RICHMOND RESIDENTS FOR RESPONSIBLE ANTENNA PLACEMENT et al., Plaintiffs and Appellants, v. CITY OF RICHMOND, Defendant and Respondent; OMNIPOINT COMMUNICATIONS et al., Real Parties in Interest.	A123672 (Contra Costa County Super. Ct. No. MSN071404)

This action contests the City of Richmond's (City) issuance of a permit for the construction of a cellular telephone antenna facility on the roof of an apartment building. Richmond Residents for Responsible Antenna Placement, an association of some 130 residents of the City of Richmond, filed a petition for a writ of mandate and declaratory relief action challenging issuance of the permit on the grounds that the City issued the permit in violation of state and federal due process clauses, the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.), and the Richmond Municipal Code. The trial court denied the petition and plaintiffs' subsequent motions for new trial and to vacate judgment. We also find plaintiffs' challenges lack merit, and affirm the judgment.

BACKGROUND

Omnipoint Communications, Inc. (Omnipoint) applied for a building permit to allow construction of a rooftop wireless telecommunications facility on an apartment building owned by Gerald and Janice Feagley. The plans submitted with the permit application showed the six antennas that were to be housed entirely within a six and one-half by eight-foot rooftop "cabinet" with walls designed to match the existing building. City staff approved the plans after determining that the proposed construction complied with the relevant provisions of the Richmond Municipal Code. Based on that approval, the City issued the permit.

Plaintiffs filed a petition for writ of mandate directing the City to set aside its approval and a complaint for declaratory and injunctive relief against the City. The Feagleys, T-Mobile, Inc. and related entities, including Omnipoint, were named as real parties in interest. The petition challenged the City's failure to provide the community with public notice and an opportunity to be heard before approving the wireless service facility and alleged violations of constitutional, statutory and municipal law. Plaintiffs sought issuance of a writ of mandate to set aside issuance of the permit, and injunctive relief ordering defendants to suspend all construction or operation of the facility. Omnipoint, the City and the Feagleys opposed the petition.

The trial court denied relief. The court determined plaintiffs' CEQA claims were without merit because the proposed facility did not require environmental review. It explained: "While the Court agrees there is an element of discretion in approval of a building permit, it cannot find that a building permit is a project, triggering CEQA analysis. In order to trigger CEQA, a project must have significant environmental effects. Here, the City is precluded from considering the environmental effects asserted by Petitioners, namely, health effects from radio frequency ('RF') emissions and declining property values based on fears about those health effects. (*See* 47 U.S.C. § 332(c)(7)(B)(iv); *AT&T Wireless Servs. Of Cal., LLC v. City of Carlsbad* (S.D. Cal. 2003) 308 F. Supp. 2d 1148, 1159; *MetroPCS, Inc. v. City & County of S.F.* (9th Cir. [(2005)] 400 F.3d 715, 736; *Preston v. Bd. of Adjustment of New Castle County* (Del.

2002) 804 A.2d 1067.)" The court also determined that aesthetic impacts of the facility were "demonstrably insignificant."

Plaintiffs' contention that the permit approval violated the Richmond Municipal Code was unfounded because the City had correctly determined the project was exempt from the City's process under the relevant zoning code provisions due to its design and placement. Finally, the court rejected plaintiffs' due process claims. "The City did not need to provide public notice and opportunity to be heard to citizens which might be adversely affected by a wireless telecommunications facility. The City is prohibited by federal law, 47 U.S.C. § 332(c)(7)(B)(iv), from considering these effects in approving or denying a permit for a wireless communication facility, such as the wireless telecommunication facility here. Thus, no cognizable life or property interest is implicated."

Plaintiffs filed motions for a new trial and to vacate the judgment. Both were denied. This appeal timely followed.

DISCUSSION

I. *Legal Standards*

"A traditional writ of mandate under Code of Civil Procedure section 1085 is a method for compelling a city to perform a legal, usually ministerial duty. [Citation.] When a court reviews an administrative decision pursuant to Code of Civil Procedure section 1085, it merely asks whether the agency's action was arbitrary, capricious, or entirely lacking in evidentiary support, or whether the agency failed to follow the procedure and give the notices the law requires. [Citations.] In reviewing a trial court's judgment on a petition for writ of ordinary mandate, we apply the substantial evidence test to the trial court's factual findings. However, we exercise our independent judgment on legal issues, such as the interpretation of statutory [] provisions." (*Kreeft v. City of Oakland* (1998) 68 Cal.App.4th 46, 53; *Friends of the Old Trees v. Department of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1389 & fn. 4 [no practical difference between the standards of review applied under traditional or administrative mandamus].)

II. *CEQA*

Plaintiffs contend the City violated CEQA when it approved the construction of the antenna facility without analyzing its potential environmental impacts and without public environmental review. The question, more precisely, is whether the City's decision was abuse of discretion, i.e., whether "the agency did not proceed as required by law or there was no substantial evidence to support its decision." (*Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1259; Pub. Resources Code, § 21168.5.) The trial court correctly ruled that CEQA does not apply because the antenna installation does not constitute a "project" triggering CEQA analysis.

The threshold question in determining whether an activity is subject to CEQA is whether it is considered a "project" under the Act. (Cal. Code Regs., tit. 14, § 15060, subd. (c); see Practice Under the California Environmental Quality Act (Cont.Ed.Bar 2d ed. 2009) § 4.5, p. 158.) Critically here, only an activity that may cause either a direct or reasonably foreseeable indirect physical change to the environment is a "project" for purposes of CEQA. (Pub. Resources Code, § 21065; *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1377.) Although "project" is defined broadly for these purposes, " 'the broad definition of project is tempered by the requirement that CEQA applies only to those activities which "may have a significant effect on the environment." ' " (*Id*. at p. 1379.)

Here, the only direct or reasonably foreseeable indirect environmental changes identified by plaintiffs are potentially harmful emissions that will emanate from the antennas.[1] But the City is prohibited by federal law from regulating the placement or construction of wireless service facilities on the basis of environmental effects of RF

[1] Although in the trial court plaintiffs rather vaguely claimed adverse aesthetic impacts due to the wireless facility's rooftop location, on appeal they have not challenged the trial court's finding that the structure itself has no significant aesthetic impacts. Instead, their arguments in this court are directed to the alleged direct and indirect effects of RF emissions.

emissions. Under the Telecommunications Act of 1996 (TCA), "No state or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communication] Commission's regulations concerning such emissions." (47 U.S.C. § 332(c)(7)(B)(iv). The legislative history of the TCA makes clear that local government may not deny an application for a wireless facility based on concerns over even *indirect* environmental effects of RF emissions, such as diminution in property values due to fears about health effects of RF emissions. (*AT&T Wireless Services of Cal. v. City of Carlsbad, supra,* 308 F.Supp.2d at p. 1159.) Accordingly, unless RF emissions from the Omnipoint facility exceed FCC limits, the City is precluded from considering their environmental effects in its assessment of the Omnipoint permit application. The trial court correctly ruled that plaintiffs' declarations describing adverse physical and economic impacts attributed to RF emissions were irrelevant.[2]

Plaintiffs assert, however, that the City had a duty to conduct an environmental review to determine whether RF emissions from the enclosure complied with FCC limits before approving the permit—and, therefore, whether the antenna installation falls within title 47 United States Code section 332(c)(7)(B)(iv)'s preemptive reach. They cite no authority supporting such a duty, and we are aware of none. Instead, they rely primarily on *Sprint Telephone PCS, L.P. v. County of San* Diego (9th Cir. en banc 2008) 543 F.3d 571, which has, at best, little relevance here. In *Sprint*, the Ninth Circuit considered a facial challenge to a local zoning ordinance. Sprint argued that the ordinance was preempted by a provision of the TCA *not* at issue here (47 U.S.C. § 253).[3] The Ninth

---

[2] Because we agree with that ruling, we need not and therefore do not address the court's additional ruling that the declarations were also inadmissible because they were not part of the administrative record.

[3] Title 47 United States Code section 253 was enacted as part of an effort to prevent state and local governments from granting and maintaining local telecommunications monopolies. (*Sprint Telephone PCS, L.P. v. County of San* Diego, *supra*, 543 F.3d at pp. 575-576.) It states: "No State or local statute or regulation, or

Circuit rejected Sprint's claim. Looking both to the plain language of the statute and its own interpretation of the same language in a subdivision of section 332(c)(7) not at issue in this case, the Ninth Circuit held that section 253 preempts only those local regulations that *actually* prohibit the provision of telecommunications services, not those that only potentially have such an effect. (*Sprint, supra,* at p. 579.) The *Sprint* holding has nothing to do with this case. Plaintiff's reliance on *Sprint* for its point that section 332(c)(7) preempts local regulation of wireless facilities only to the extent specified in the statute begs the question, since section 332(c)(7)(B)(iv) expressly preempts local regulatory authority.

Plaintiffs' contention that the City was required to conduct a CEQA review to assess whether the RF emissions would be within the FCC limits fails for another reason. The City's assessment would be a purely ministerial action involving no exercise of discretion. We start with the propositions that (1) CEQA does not apply to purely ministerial projects; and (2) the issuance of a building permit is presumed to be ministerial. (Pub. Resources Code, § 21080; *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 265; Cal. Code Regs., tit. 14, § 15268, subd. (b).) The CEQA guidelines in the California Code of Regulations explain what this means. According to the guidelines, a discretionary project is one that " 'requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations.' " (Cal. Code Regs., tit. 14, § 15357.) A ministerial action, on the other hand, is " 'a governmental decision involving little or no personal judgment by the public official as to the wisdom *or manner of carrying out* the project. . . . A ministerial decision involves only the use of *fixed standards* or *objective measurements*, and the public official cannot use personal, subjective judgment in

---

other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." (47 U.S.C. § 253(a); *Sprint, supra,* at p. 576.)

deciding whether *or how* the project should be carried out.' " (*Friends of Westwood, Inc., supra,* at p. 270; Cal. Code Regs., tit. 14, § 15369.) Applying these principles to this case, the determination plaintiffs now claim required CEQA review—whether the RF emissions from the structure would exceed FCC limits—is plainly ministerial in nature and, hence, could not trigger CEQA review.[4]

The trial court correctly determined that no CEQA review was required because the installation of the antenna facility does not qualify as a "project" triggering CEQA review. We therefore do not address respondent's other bases for asserting the facility is exempt from CEQA review.

III. *Richmond Municipal Code*

Plaintiffs challenge the trial court's conclusion that the antenna enclosure complies with the Richmond Municipal Code's requirements for wireless service facilities located within residential zones. Here, too, their contentions lack merit.

The City's wireless communications ordinance (Richmond Mun. Code, §§ 15.04.000 et seq.) prohibits the siting of wireless service facilities within residential districts unless they fall within specified exemptions.[5] (§§ 15.04.820.031,

---

[4] Oddly enough, plaintiffs' own evidence shows that the RF emissions from the wireless facility are no higher than 2.66 percent of the FCC's limits, and that plaintiffs' claim that the emissions exceed those limits by 2,600 percent is based on an arithmetical error which seems to be the product of confusing watts with milliwatts.

[5] Richmond Municipal Code section 15.04.820.031 states: "The purpose of these regulations is to provide a basis for meeting the present and future communication needs of the City of Richmond, and of West Contra Costa County generally, while minimizing the visual and environmental impacts of new, wireless technology developed to meet those needs. A conditional use permit is required for any wireless communication facility that does not meet the applicable site development criteria in Section 15.04.820.033, or a wireless communications tower over 35 feet. All proposed wireless communication facilities that require a conditional use permit shall also require environmental review by the Environmental Assessment Panel (EAP). [¶] Wireless communication facilities are prohibited in all R Districts and in the PA, C-C, M-4 and CRR Districts, except as set forth in Section 15.04.820.032, Exemptions below."

It is undisputed that the Feagleys' building is located in a residentially zoned district.

15.04.820.032.) Those exemptions are for antennas that: (1) "are installed, placed or maintained under the roof"; (2) "do not extend above the roof"; (3) "are behind and below an approved roof screen and do not protrude above the highest point of the building"; or (4) "are camouflaged in such a way as to not be visible from a public right-of-way or other property. . . ." (§§ 15.04.820.032.) Antenna installations that fall within these categories may be constructed in residential districts, are exempt from further site development criteria (§§ 15.04.820.032, 15.04.820.033), and are not subject to the conditional use permit and environmental review requirements applied to nonexempt projects. (§§ 15.04.820.034, 15.04.820.035.)

City planning staff determined that the Omnipoint application was exempt from the City's conditional use permit and environmental review processes because the proposed antennas were behind and below an approved roof screen and because they were camouflaged so that they would be invisible from a public right-of-way or adjacent property. As explained in a letter from the city attorney to plaintiff Andrew Olmsted, "[t]he building permit plan set . . . shows a rooftop cabinet with screen walls of a color and texture to match existing building walls. The telecommunication antennas are housed within the rooftop cabinet. As presented, the plans show, 'Antennas that are installed, placed or maintained . . . behind and below an approved roof screen and . . . are camouflaged in such a way as to not be visible from a public right-of-way or other property" and therefore complied with Richmond Municipal Code section 15.04.82.032. Because the record supports the trial court's concurrence in these findings, we will not disturb them on appeal. (See *Kreeft v. City of Oakland, supra,* 68 Cal.App.4th at p. 53.)

Plaintiffs argue the antennas are not "camouflaged" within the meaning of the municipal code despite the undisputed evidence that they are hidden behind walls that match the preexisting building. Their argument is unconvincing.[6] "Camouflage," in its

[6] Plaintiffs also contend the antennas are not "behind and below an approved roof screen and do not protrude above the highest point of the building" within the meaning of Richmond Municipal Code section 15.04.82.032 because, although they are completely hidden by the screen, both the antennas and the screen protrude above the building's roof.

nonmilitary sense, means "concealment by means of disguise." (Webster's 3d New Internat. Dict. (2002) p. 322.) Plaintiffs do not dispute that the antennas are completely concealed by the screening walls built to match the building, but contend that this cannot be considered "camouflage" because Richmond Municipal Code section 15.04.82.032 *also* contains an exemption for antennas that are hidden behind a roof screen. They argue, in effect, that an installation that (at least arguably) falls within *both* exemptions cannot fall within either. Under plaintiff's interpretation, the City's ordinance would thus exempt a proposed antenna project if it satisfies one of the four criteria, but not if it satisfied two—or three, or all of them. Since each of the criteria minimizes the public impact of telecommunications antennas by hiding or disguising them, there is absolutely no sense in an interpretation that would only exempt a project that satisfies one, *but not more*, of those criteria. That is not what the language of the ordinance implies, and it flies in the face of common sense. Because the Omnipoint antennas are exempt, the City did not violate its own ordinance when it allowed the facility in a residential district and without requiring a conditional use permit or environmental review.

IV. *Due Process*

Plaintiffs' contention that the City violated their due process rights to notice and a hearing is also unpersuasive. "[C]onstitutional notice and hearing requirements are triggered only by governmental action which results in 'significant' or 'substantial deprivations of property, not by agency decisions having only a de minimis effect on land." (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 616.) Plaintiffs assert they have suffered such a substantial deprivation because "the antennas' RF emissions, as well as their impact on property values, have harmed [their] constitutionally protected interests." As discussed in section II, *ante*, the trial court correctly determined that federal law prohibited it from considering the alleged health effects of RF emissions and

---

The Feagleys respond that the roof screen is *part* of the building and, therefore, that the antennas do not protrude above the building. We need not resolve this dispute over interpretation because, as we shall explain, the facility is exempt because it is "camouflaged."

any alleged indirect effects therefrom such as diminution in property values and interference with plaintiffs' use and enjoyment of their property. (47 U.S.C. § 332(c)(7); *AT&T Wireless Services of Cal. v. City of Carlsbad, supra,* 308 F.Supp.2d at pp. 1159-1160.)

Plaintiffs contend that principles of due process nonetheless required the City to hold a public hearing on whether the proposed wireless facility would exceed FCC emission standards for RF emissions or cause environmental harm regardless of compliance with those standards. This contention suffers the same flaw as their CEQA argument: constitutional notice and hearing requirements are not triggered by actions that involve "only the nondiscretionary application of objective standards" (*Horn v. County of Ventura, supra,* 24 Cal.3d at p. 616), a category that surely encompasses the determination of whether RF emissions from a wireless service facility exceed the established federal standard. Moreover, a hearing on whether the installation would cause environmental harm regardless of its compliance with FCC requirements would be an exercise in futility because, no matter what the outcome, the TCA prohibits the City from denying a permit on the basis of those concerns.

Plaintiffs additionally contend the City infringed their state constitutional right to be free from "arbitrary adjudicative procedures" because it "arbitrarily decided that the surrounding neighborhood would not be adversely affected by the installation of the cell antennas and consequently failed to provide notice. . . ." To the contrary, the record shows that the City approved the permit only after assessing it under the fixed criteria set forth in Richmond Municipal Code section 15.04.820.031. There was nothing arbitrary about its resulting decision that the project satisfied those criteria. We find no error in the court's denial of the petition for writ of mandamus.

DISPOSITION

The judgment is affirmed.

_____
Siggins, J.

We concur:

_____
Pollak, Acting P.J.

_____
Jenkins, J.